Filed 2/23/05 In re J.A. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re J. A., a Person Coming Under the Juvenile Court Law.	B177675 (Los Angeles County Super. Ct. No. CK51696)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ARTHUR A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Juvenile Court Referee. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and William D. Thetform, Senior Deputy County Counsel, for Plaintiff and Respondent.

No appearance on behalf of Minor.

Appellant Arthur A. (Father) appeals an order of the juvenile court terminating his parental rights to his son, J.A., under Welfare and Institutions Code section 366.26. (All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.) Father, who was incarcerated at the time of the hearing at which his parental rights were terminated, contends he did not receive proper notice of the hearing. He further contends that the juvenile court failed to obtain a valid waiver of his appearance prior to conducting the hearing and he was prejudiced by his absence from the hearing. We conclude that Father waived any errors in the notice of the hearing or failure to obtain a written waiver of appearance by failing to object on this basis in the juvenile court. In addition, because we find that Father's appearance at the hearing would not have produced a more favorable result, any error in the notice or failure to obtain a waiver of appearance was harmless. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

J.A. was detained from his Mother on March 20, 2003, when he and his brother were found home alone and Mother was arrested on an outstanding warrant for prostitution. Appellant, who has been incarcerated throughout these proceedings, was identified as J.A.'s father.

The Los Angeles County Department of Children and Family Services (the Department) filed a petition under section 300, subdivisions (b) and (g), alleging that Mother had a history of substance abuse and used marijuana daily, the home was filthy and unsafe, Mother would leave her children home alone or with inadequate adult supervision, and Mother had failed to establish an appropriate plan for the care of the children during her incarceration. The Department's first amended petition added allegations regarding Father's incarceration and history of drug-related arrests, convictions, and parole violations. The juvenile court sustained the first amended petition, and ordered reunification services for Father.

On January 6, 2004, the Department reported that Father expected to serve 32 months of a 44-month sentence. Noting that Father's incarceration would exceed an

additional six-month-review period, the court continued the hearing to February 9, 2004 for a contested hearing. The Department was ordered to give notice to Father that it was recommending termination of his reunification services. At the February 9, 2004 hearing, the court terminated Father's reunification services, and set a selection and implementation hearing pursuant to section 366.26 for June 7, 2004.[1]

The Department personally served Father with notice of the June 7, 2004 hearing, indicating its recommendation of adoption. In addition, an order to have Father transported to the hearing from prison was issued by the court and personally delivered to Father, but Father submitted a written waiver of his appearance for the June 7, 2004 hearing.[2] The court found notice to Father to be proper, and ordered that only courtesy notice need be given in the future.

At the June 7 hearing, new counsel was appointed to represent Mother, who objected to the termination of parental rights and requested a continuance. The court granted the continuance, set the matter for a contested section 366.26 hearing on July 21, 2004, and ordered the Department to initiate a "statewide in-and-out" for Father to be transported for the hearing or obtain a certified signed waiver of his appearance.

On July 21, 2004, the court conducted the selection and implementation hearing pursuant to section 366.26. Father was not present, and the court stated that it had a "statewide in-and-out waiver" of appearance signed by Father. But the only written waiver signed by Father was dated June 2, 2004, five days before the July 21, 2004

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[1] The court incorrectly stated it had terminated Father's reunification services at the January 6, 2004 hearing, but the court's minute order reflects the court had not in fact terminated Father's services at the January 6, 2004 hearing. Father nevertheless acknowledges that by the February 9, 2004 hearing it was the court's clear intent to terminate Father's reunification services.

[2] The court did not appear to be aware that Father had submitted a written waiver of his appearance for the June 7, 2004 hearing. Instead, the court interpreted the copy of the removal order across which was written "refused" with the date "June 4, 2004" and an illegible signature as Father's indication that he had received notice and did not intend to appear at the hearing.

hearing had even been set. Although the record contains a second removal order dated June 29, 2004 with the word "REFUSED" and an illegible signature written across the front, no waiver of appearance for the July 21, 2004 hearing executed by Father appears in the record.

Father's attorney did not object to the court's findings that notice to Father was proper and he had waived his appearance at the July 21, 2004 hearing. Instead, counsel explained her client's absence from the proceedings and argued his position with respect to the plan of adoption:

"My client is the father of [J.A.], who is present, and he indicated to me he is not present today and waived because he recently had surgery, and he is not in a physical condition to travel. My client indicated to me that if he had no other legal position, he felt that the current caretaker, . . ., would be an appropriate person to care for her [*sic*] child, and if adoption was the plan, he thought that she would do a good job. [¶] The last-minute today, however, indicates that adoption with this person is not a done deal, that she hasn't had time to meet with the social worker, and the supervisor to further explore her desire to adopt her children. [¶] And I would ask that the court not terminate parental rights at this point because, should this very capable relative caregiver decide that adoption is not the best plan, that would place this child in the position of being a legal orphan."

The minor's attorney also asked the court not to terminate parental rights because, although she thought the child's placement was stable, she wanted additional time to investigate prior to terminating parental rights.

The court then terminated Father's parental rights. Father's counsel asked the court to stay the order on the grounds that there was no current home study and counsel did not have a copy of an adoption assessment. The court denied the request for a stay, finding the lack of a current home study was not an impediment to terminating parental rights, and an adoption assessment dated April 28, 2004 was attached to the Department's June 7, 2004 section 366.26 report.

Father's appeal from the order terminating his parental rights followed.

DISCUSSION

A. Father Waived Any Errors With Respect to the Notice of the July 21, 2004 Hearing and Failure to Obtain a Written Waiver of Father's Appearance at the Hearing.

Father contends that the order terminating his parental rights must be reversed because the juvenile court violated his constitutional and statutory rights to receive notice of and appear at the hearing at which the court terminated his parental rights. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306-307 [principles of due process apply in dependency proceedings, and require both notice and opportunity to be heard].) He asserts that by failing to give proper notice and obtain a written waiver of appearance from him as required under Penal Code section 2625, the juvenile court lacked jurisdiction to conduct the hearing. We disagree.

Penal Code section 2625,[3] subdivision (b) requires that an incarcerated parent be given notice of any hearing to terminate parental rights under Welfare & Institutions

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3 Penal Code section 2625 provides in relevant part:

"(b) In any proceeding brought under . . . Section 366.26 of the Welfare and Institutions Code, where the proceeding seeks to terminate the parental rights of any prisoner, . . . the superior court . . . shall order notice of any court proceeding regarding the proceeding transmitted to the prisoner.

"(c) Service of notice shall be made pursuant to Section 7881 or 7882 of the Family Code or Section 290.2, 291, or 294 of the Welfare and Institutions Code, as appropriate.

"(d) Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. No proceeding may be held under . . . Section 366.26 of the Welfare and Institutions Code . . . without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institution, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding."

Code section 366.26. (*In re Julian L.* (1998) 67 Cal.App.4th 204, 208 (*Julian L.*).) Subdivision (d) of Penal Code section 2625 further provides that if the parent has indicated a desire to be present during the court's proceedings, the court must issue an order for the temporary removal of the parent from the institution where he or she is incarcerated, and no proceeding under Welfare & Institutions Code section 366.26 may be held without the physical presence of the parent *or* the parent's attorney unless the court has before it a knowing and written waiver of the parent's appearance at the hearing. The word "or" is to be interpreted in the conjunctive to require the presence of *both* the prisoner and the prisoner's attorney. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622 (*Jesusa V.*).) And a prisoner's waiver of appearance at one hearing does not operate to waive notice of subsequent hearings. (*Julian L., supra,* 67 Cal.App.4th at p. 208.)

Like the incarcerated parent in *Jesusa V.*, Father asserts that the requirements of subdivision (d) of Penal Code section 2625 afforded him an absolute right to be present at the hearing to terminate his parental rights. (See *Jesusa V., supra*, 32 Cal.4th at p. 621.) But as the Supreme Court held, the statutory mandate of Penal Code section 2625 requiring notice of hearing and the physical presence or a signed waiver of appearance from an incarcerated parent is not a jurisdictional prerequisite to conducting a hearing under Welfare & Institutions Code section 366.26. (*Jesusa V., supra,* at p. 625.) Rather, violations of Penal Code section 2625 are subject to harmless error analysis. (*Jesusa V., supra,* at p. 625.) Moreover, any error in failing to give proper notice of a hearing or otherwise comply with the requirements of Penal Code section 2625 may be waived if no objection to the proceeding is asserted in the juvenile court. (*In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1198-1200 (*Gilberto M.*).)

In this case, Father waived any errors with respect to notice or the lack of an appearance waiver by failing to raise them below. Father was represented by counsel at the July 21, 2004 hearing, and his lawyer specifically advised the court that Father was "not present *today* and *waived* because he recently had surgery, and he is not in a

physical condition to travel."[4] (Italics added.) Father's attorney went on to argue Father's position that he favored adoption by the current caretaker. Indeed, the only objection to terminating parental rights asserted by Father's attorney at the section 366.26 hearing was that since adoption by the caretaker was not a "done deal," if the caretaker should decide not to adopt, the minor would become a "legal orphan." Significantly, Father's attorney did not object to the hearing itself, and made no suggestion that Father did not have notice of the hearing or had not waived his appearance.

Father attempts to distinguish *Gilberto M.* on the ground that that case involved a failure to serve notice of a hearing under Welfare & Institutions Code section 366.21, not section 366.26. Arguing that Penal Code section 2625 applies only to proceedings under Welfare & Institutions Code section 366.26, and since violation of Penal Code section 2625 deprived the juvenile court of jurisdiction to proceed with the hearing to terminate his parental rights, Father contends that *Gilberto M.* is inapposite, and he did not waive his challenge to the lack of notice by failing to object below. But in light of the Supreme Court's determination in *Jesusa V.* that violation of Penal Code section 2625 does not strip the juvenile court of jurisdiction to proceed with a Welfare & Institutions Code section 366.26 hearing, Father's attempt to distinguish *Gilberto M.* fails.

In *Gilberto M.*, the court applied well-settled law from nondependency cases to hold that a parent who had participated in the hearing on its merits had waived all jurisdictional objections to the proceeding, including lack of notice. (*Gilberto M.*, *supra*, 6 Cal.App.4th at p. 1200.) The court further specifically held that the parent's failure at the hearing to object to a violation of his rights under Penal Code section 2625 waived that claim on appeal as well. (*Gilberto M.*, *supra*, at p. 1200, fn. 7.) There can be no question in this case but that Father fully participated in the termination of parental rights hearing on its merits through his attorney of record without asserting any objection on the

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4 There is no ambiguity in counsel's use of the word "today," and there is no support for Father's contention that his attorney was referring to the previous hearing, which was conducted over a month earlier.

basis of a violation of Penal Code section 2625. He thereby waived his challenge to the juvenile court's order terminating his parental rights.

Moreover, even if Father had not waived his challenge, there was no lack of compliance with the notice requirements of Penal Code section 2625 requiring reversal in this case. Subdivisions (b) and (c) of Penal Code section 2625 require that notice of any court proceeding under Welfare & Institutions Code section 366.26 be given to an incarcerated parent in accordance with Welfare & Institutions Code section 294. But subdivision (i) of section 294 provides that if the parent's attorney of record is present at the time the court schedules a hearing pursuant to section 366.26, no further notice is required, except notice to the attorney of record. Here, Father's attorney of record was present and participated in the June 7, 2004 hearing at which the court scheduled the July 21, 2004 section 366.26 hearing. At the June 7 hearing the juvenile court found that Father had been personally served with notice of that hearing, and had validly waived his appearance. In light of this finding, the court correctly ruled that no further notice to Father was required. (Welf. & Inst. Code, § 294, subd. (i).)

Julian L., cited by Father, is inapposite. In *Julian L.*, the Court of Appeal confronted a series of cumulative errors that it concluded effectively denied "mother any opportunity to be heard during the section 366.26 hearing where her parental rights were terminated." (*Julian L., supra*, 67 Cal.App.4th at p. 207.) After relieving mother's attorney at an earlier hearing, the juvenile court continued the section 366.26 hearing without notifying mother. The juvenile court then improperly concluded that mother had waived her appearance at the continued hearing based on her waiver of appearance for the prior hearing, and denied newly appointed counsel's request for a continuance. Finally, the juvenile court failed to consider the minor's wishes. In stark contrast to the instant case, neither mother nor her new counsel had been present when the juvenile court set the section 366.26 hearing date, and in requesting a continuance, counsel informed the court that in the week since he had been appointed, he had not had an opportunity to ascertain mother's wishes. (*Julian L., supra,* at p. 208.)

Any error with respect to notice of hearing and Father's waiver of appearance in this case bears little resemblance to the series of errors committed by the juvenile court in *Julian L.* Here, Father's attorney of record appeared at the June 7, 2004 hearing during which the juvenile court set the July 21, 2004 section 366.26 hearing. The juvenile court ordered the removal of Father for the July 21 hearing, and there is some indication (albeit insufficient to satisfy the procedural requirements of § 294) that service of the notice and removal order was attempted and Father refused service.[5] Moreover, at the July 21 hearing, counsel not only represented to the juvenile court that Father had waived his appearance at that hearing, but argued Father's position with regard to adoption.

B. The Alleged Errors Were Harmless Because There Is No Probability of a More Favorable Result.

Even if we were to reach the merits of Father's contention, we would nevertheless find the specified errors were harmless. In *Jesusa V.*, the Supreme Court analogized the mandate under Penal Code section 2625 to a criminal defendant's right to be present at trial under Penal Code sections 977 and 1043, and observed, "[d]espite the statutory mandate in [those] sections . . ., we have regularly applied a harmless-error analysis when a defendant has been involuntarily absent from a criminal trial. [Citations.] We do not believe the Legislature intended a different result in the analogous circumstance here, when a prisoner is involuntarily absent from a dependency proceeding." (*Jesusa V.*, *supra*, 32 Cal.4th at p. 625.) Accordingly, the involuntary absence of an incarcerated

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5 Father claims that because of black felt-tip pen notations across the front of the removal order, it is unclear whether the order pertained to him or to Mother. He contends that even if it is assumed the order related to him, there is no signed waiver of appearance as required under Penal Code section 2625. But there is no need to speculate whether the removal order related to Father because his name can be easily read through the notations across the front of the order on the copy included in the record on appeal, and the order clearly bears Father's California Department of Corrections number.

parent from a dependency proceeding is reversible only if it is reasonably probable the result would have been more favorable to the parent absent the error. (*Ibid*.)

Father contends his absence from the hearing was prejudicial beyond a reasonable doubt because, had he been present, "he could have more forcefully explained how he, as the child's biological father, was a better alternative than making minor an orphan without an identified adoptive family." Not only did Father's attorney make this argument at the hearing, but the existence of an identified adoptive family is irrelevant at the section 366.26 hearing, where the juvenile court's inquiry is whether the child is likely to be adopted. (§ 366.26, subd. (c)(1) ["The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted"]; see also *In re Scott M.* (1993) 13 Cal.App.4th 839, 844; *In re Sarah M*. (1994) 22 Cal.App.4th 1642, 1649-1650.)

Father also argues that his absence from the hearing was prejudicial because he was the nonoffending parent, the termination of his family reunification services was based solely on the length of his incarceration,[6] and he did everything he could to comply with the juvenile court's orders. Again, since the focus at the section 366.26 hearing is on the *child*, these matters were immaterial to the juvenile court's determination. (*In re Celine R*. (2003) 31 Cal.4th 45, 53 ["Whenever the court finds 'that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption'"]; § 366.26, subd. (c)(1).) "The circumstance that the court has terminated reunification services provides 'a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more' of specified circumstances. ([§ 366.26, subd. (c)(1)].) The Legislature has thus determined that, where possible, adoption is the first choice." (*In re Celine R*., *supra*, 31 Cal.4th at p. 53.) Indeed, if the child is found to be adoptable,

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6 Father does not, however, contend that the juvenile court erred in terminating reunification services on this or any other basis.

"the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child. The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—'must be considered in view of the legislative preference for adoption when reunification efforts have failed.' [Citation.]" (*Ibid.*)

Father has not established that his presence at the hearing at which his parental rights were terminated would have resulted in a more favorable outcome. Any violation of the requirements of Penal Code section 2625 was therefore harmless beyond a reasonable doubt.

DISPOSITION

The order of the juvenile court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

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